

# North Lanarkshire Council Report

## Finance & Resources Committee

Agenda item \_\_\_\_\_  approval  noting    Ref FW/HL    Date 4 Feb 19

### New Alcohol & Drugs Policy (Including Testing Procedure for Alcohol and Drugs)

**From** Fiona Whittaker, Head of People & Organisational Development  
**Email** liddleh@northlan.gov.uk    **Telephone** Heather Liddle, 01698 520629

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#### Executive Summary

Following earlier consideration in October 2017, the Extended CMT gave initial approval to the introduction of an alcohol and drug testing programme for employees, and recommended that the proposal was taken out to consultation with trade unions and other recognised stakeholders. A review of the Alcohol and Drugs Policy was undertaken as a result of the proposed programme – this formed the basis of the consultation exercise and a committee report to Enterprise & Housing Committee on 10 May 2018. Following representation from the trade unions, officers were asked to carry out additional consultation with the trade unions. This report outlines the result of this consultation and sets out a recommended way forward.

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#### Recommendations

It is recommended that the Finance & Resources Committee

1. Note the outcomes from the additional consultation undertaken with stakeholders and approves the new policy and introduction of “with cause” testing.
  2. Otherwise note the contents of the report.
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#### Supporting Documents

**Council business plan to 2020**    Improve the Council's resource base  
**Appendix One**    Feedback from stakeholders  
**Appendix Two**    Alcohol & Drugs Policy

## **1. Background**

- 1.1 Following a period of consideration by a small working group comprising of Council officers and trade union representatives, the Extended CMT gave approval to the outline terms of a proposed drug and alcohol testing programme.
  - 1.2 The proposed programme was based on a recommendation of random testing of those deemed to be in safety critical roles (this will include anyone who drives for the Council) and a “with cause” programme which would cover all employees.
  - 1.3 Prior to submission to the Enterprise and Housing Committee in May 2018, a full consultation exercise was undertaken with stakeholders. However, following further representation on behalf of the trade unions, it was agreed that an additional period of consultation would be undertaken. To this end, a consultation meeting involving trade union colleagues was held on 26 June 2018. Additional written comments were submitted by the NASUWT and SSTA.
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## **2. Report**

- 2.1 Taking into account the Council’s responsibilities and legal obligations, the outline terms of the originally proposed testing programme were established on the following terms:
  - Random testing of employees in safety critical roles
  - Random testing of employees who drive for the Council (this will include anyone who is covered by the Council’s insurance to drive pool cars)
  - “With cause” testing of all employees
- 2.2 Despite concerns raised by the EIS and Joint Trade Unions during the first phase of consultation on testing, the Corporate Management Team (CMT) made the decision to progress a report to Enterprise and Housing Committee based on the terms outlined in 2.1 above. However, following representation from the trade unions, elected members agreed that consideration of the report be continued to a future committee meeting.
- 2.3 An additional meeting with trade unions was held on 26 June 2018, attended by the Head of Regulatory Services & Waste Solutions, Employee Relations Manager and representatives from the NASUWT, Unison, Unite and the GMB
- 2.4 **Proposed Way Forward**
  - 2.4.1 Despite additional discussions with trade union partners, there remains a strong opposition to the introduction of random alcohol and drug testing. The primary objection from the trade unions relates to a perceived breach of human rights. The Human Rights Act 1988 is one of the pieces of legislation which has been considered when developing this programme. A study of case law demonstrates that the right to privacy may be legitimately restricted in certain circumstances. The fundamental question is whether or not an infringement of an employee’s right to a private life is designed to achieve a legitimate business aim, and is

proportionate to the achievement of that aim. While the Council position remains that random testing could be legitimately introduced, it is recognised that the ongoing strength of opposition from trade unions may make the introduction of random testing difficult to achieve.

- 2.4.2 In order to move the proposal forward, it is recommended that alcohol and drug testing is introduced on a “with cause” basis only. Although there remains opposition to “with cause” testing from the NASUWT and SSTA, clear parameters will be established to ensure testing takes place in line with clear procedures. With cause testing will cover all employees, and will be used when there is reasonable belief that an employee is under the influence of alcohol or drugs, and there is a reasonable concern that this is having a negative impact on their ability to carry out their duties in a safe or satisfactory manner. To prevent concerns over misuse of the ability to seek a with cause test, it is recommended that no action is taken to request a test until it has been discussed and agreed with a Head of Service or Executive Director. This approach mirrors the action taken before the precautionary suspension of any employee and will ensure the facility is used appropriately.
- 2.4.3 Discussions with our trade union partners have highlighted that the Council may struggle to achieve an agreement on variations to contract terms which allow the Council to reserve the right to undertake alcohol or drug testing. The original thought on varying contract terms was with a view to strengthening the Council position, should there be a termination of employment based on alcohol or drug misuse. However, even where such a variation could be achieved, the Council would still be required to seek written approval on each and every occasion before tests were taken. Given this requirement, and subject to approval of the Council position in the new policy, it is recommended that we do not enter into possibly protracted negotiations over contract amendments. Subject to approval, the testing programme can be introduced without a change in contract terms.

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### **3. Equality and Diversity**

- 3.1 There is no requirement to carry out a Fairer Scotland assessment.
- 3.2 An equality impact assessment has been carried out on this policy and does not raise any issues which prevent onward publication of the policy.

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### **4. Implications**

#### **4.1 Financial Impact**

Health Management Ltd has now provided details of the costs for the proposed programme. On the basis of current experience, with cause testing may be required approximately a dozen times per year. This would be an approximate cost of £3500 per annum.

#### 4.2 **HR/Policy/Legislative Impact**

As outlined above. An equality impact assessment has now been finalised.

#### 4.3 **Environmental Impact**

No environmental impact.

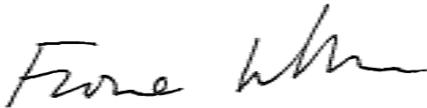
#### 4.4 **Risk Impact**

The introduction of a testing programme may not be favourable, but is likely to be more justifiable on a “with cause” basis. However, testing will lower the potential health and safety risk to employees and the public, and promote a safer working environment.

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### 5. **Measures of success**

- 5.1 A safe working environment where risks of accident/injury attributable to drug and alcohol misuse is lowered.
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**Fiona Whittaker**

**Head of People & Organisational Development**

## Appendix One – Summary of Feedback from Stakeholders

	Comments Received	Council Position
<b>Joint Trade Unions</b> <b>(Unison, Unite, GMB)</b>	<p>The Joint Trade Union (JTU) response welcomed attempts to clarify the Council position and the introduction of “with cause” testing. Comments were made around the process of manager requests for “with cause” tests which can be accommodated in the new policy. The JTU asked that employees are also given the opportunity to request a “with cause” test for occasions where they want to provide an assurance that they are fit for work. This could be considered under exceptional circumstances.</p> <p>However, the JTU do not support the introduction of random testing as they are of the view that this contravenes Article 8 of the Human Rights Act which supports an individual’s right to a private and family life. In addition, while the JTU note that the new policy reinforces the support available to any employee affected by addiction, they would like to see a significant move away from what they perceive to be the underlying threat of disciplinary action. In conclusion, the JTU welcome an update to the policy, but state that they cannot support the inclusion of random testing and what they consider to be an emphasis on discipline over support. The JTU strongly disagreed with any attempts to vary terms and conditions of employment.</p>	<p>It is not unexpected that the JTU wish to protect the employment of their members, but as the ultimate responsibility of the employee is to fulfil their contractual obligation to present fit for work, it is appropriate that the Council is able to take action to address such a problem, should all other attempts to address alcohol or drug dependence have failed. The new policy emphasises that anyone with an alcohol or drug problem will be encouraged and supported to seek help in the first instance.</p>
<b>Educational Institute of Scotland (EIS)</b>	<p>The EIS welcomed the opportunity to comment on the new policy and proposed testing programme but</p>	<p>The move towards “with cause” testing will affect all staff groups in the circumstances outlined in 2.4.2.</p>

	expressed concern that they had not been told officially that teachers were unlikely to be tested under the random programme (they were advised it was highly unlikely). The EIS confirmed that any proposed changes to contractual terms would need to be achieved through the collective bargaining machinery of the JNCT.	There will be no specific group targeted for testing. There is no plan to change contractual terms.
<b>NASUWT</b>	The NASUWT provided comprehensive comments which set out a number of legal challenges to the introduction of both random and “with cause” testing. The NASUWT are unconvinced that testing for teaching staff can be justified for health and safety reasons and seek further information/evidence of need from the Council to justify the proposed approach.	The Council has taken legal advice and has confirmed that the introduction of testing, particularly on a “with cause” basis is fully justifiable and legally compliant.
<b>Scottish Secondary Teachers Association (SSTA)</b>	The SSTA provided comprehensive comments, challenging all aspects of the proposed approach, primarily on legal grounds. Overall, the SSTA do not support the introduction of testing on either a random or “with cause” basis.	As above, the Council’s approach is fully justifiable and legally compliant.
<b>Feedback from Services</b>	Feedback received from Services centred around questions on how tests would be undertaken (i.e. what facilities would be needed, how long would tests take), some comments around specific aspects of wording in the draft policy and comments on how testing could impact on service delivery.	Subject to approval of the CMT to proceed towards committee, it is recommended that the testing company is invited to a future meeting of the CMT to give some assurance on how the testing programme will work at an operational level.

# Alcohol & Drugs Policy

<b>Author</b>	<i>Heather Liddle</i>	<b>Contact</b>	<i>liddleh@northlan.gov.uk</i>
<b>Owner</b>	<i>Fiona Whittaker</i>	<b>details</b>	<i>whittakerf@northlan.gov.uk</i>

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<b>Review date</b>					

## **Strategic Alignment**

*Improving the Council's Resource Base – A Workforce Strategy that is built around the needs of the Council (as a single resource base) to deliver the priority outcomes, ensuring future workforce requirements, new skills and innovative approaches, and succession planning are recognised.*

<b>Consultation process</b>	<i>Consultation with stakeholders carried out Oct 17 – May 18</i>	
<b>Stakeholders</b>	Contacts identified for each service	
	<i>Joint Trade Unions</i>	
	<i>JNC for Teaching Staff</i>	
<b>Distribution</b>		

### Change record

<b>Date</b>		<b>Author</b>	
<b>Change made</b>			

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## **1 Purpose**

Being under the influence of alcohol and drugs can seriously impair an individual's judgement, concentration and reactions leading to an increased risk of accidents and injuries.

The aim of this policy is to ensure the safety of all employees, workers, and visitors by having clear rules in place regarding use and possession of alcohol and drugs, and to support those who have reported a problem with alcohol or drug dependence.

## **2 Scope**

This policy applies to all Council employees.

## **3 Principles**

- All employees will be treated consistently and fairly in line with the policy.
- Those who advise that they have a problem with alcohol and/or drugs will be fully supported.
- Employees with an illness related to alcohol and/or drugs are encouraged to disclose this at the earliest opportunity to ensure support and help with their treatment.
- All matters concerning alcohol or drugs shall be treated as confidential.
- This policy complies with relevant legislation such as the Health & Safety at Work etc Act 1974 and the Misuse of Drugs Act 1971.

## **4 Legislation**

The Health and Safety at Work etc Act 1974 requires employers to protect the health, safety and welfare of their employees and others who may be affected by their activities, as far as is reasonably practicable.

The Management of Health and Safety at Work Regulations 1999 requires employers to carry out a risk assessment to identify hazards in the workplace and put measures in place to minimise these risks.

The Misuse of Drugs Act 1971 is the main legislation covering drugs and categorises them as classes A, B and C. These drugs are called controlled substances and class A drugs are considered to be the most harmful under this act. It is illegal for anyone, whether at work or not to produce, supply or be in possession of illegal drugs. Employers may be liable if they knowingly allow dispensing, manufacturing, possession, using or selling on their premises.

## 5 Definitions

For the purposes of this policy, alcohol dependence is defined as:

*"A physical or psychological dependence upon alcohol, with a corresponding impact on the employee's ability to perform his/her duties, his/her attendance at work is affected, or he/she endangers the safety of others."*

For the purposes of this policy, drug dependence is defined as:

*"The habitual taking of non-prescription medication, whereby the employee's ability to perform his/her duties is impaired, or his his/her attendance at work is affected, or he/she endangers the safety of others."*

*Drugs will include illegal substances, psychoactive substances (formerly known as legal highs), over the counter medication and prescription drugs. The possession and use of prescription medication will be considered legitimate.*

Employees with alcohol or drug problems fall into two categories:

- People who misuse alcohol or drugs that are not related to a physical dependency – this will be considered misconduct and will be dealt with under the Disciplinary Policy.
- People who are dependent on alcohol or drugs, and this repeatedly affects their health, behaviour or work performance – this will be considered a health issue. If appropriate, the matter will be dealt with as a capability issue.

## 6 Our position

The Council requires all employees to report for duty free from the effects of alcohol and drugs (as per definition above). It is not acceptable to be under the influence of alcohol or drugs at work or consume alcohol or drugs during hours of work- this includes paid and un-paid breaks.

Employees found in possession of illegal drugs or using illegal drugs while at work will normally be reported to the police. Advice should be sought from the Employee Relations Team at the earliest opportunity.

We may consider incidents outwith working hours that involve possessing, using or supplying drugs as a disciplinary offence. In determining whether to undertake any formal action, the following factors will be taken into account:

- Safety risks
- Where the incident took place
- Our reputation

- How the behaviour of the employee affected their responsibilities
- Contact with vulnerable groups
- Criminal proceedings

In some cases, the legitimate use of prescribed drugs can affect a person's ability to do their job. In such instances, employees should inform their line manager as soon as possible.

## **7 Alcohol and Drug Testing**

This policy on alcohol and drug testing is in addition to the terms and conditions set out in contracts of employment. The Council reserves the right under this policy to exercise alcohol and drug testing of its employees. Consent will be sought before a test is requested on each and every occasion. Testing for alcohol and/or drugs will be undertaken "with cause":

### **With Cause Alcohol and Drug Testing**

The employee may be tested for alcohol and drugs in all cases where he/she has had any involvement in a workplace accident or any incident that has caused or could have caused a danger to health or safety. Testing will also be carried out where management has grounds to believe that the employee is or may be under the influence of alcohol and/or drugs. Prior to making a request for a "with cause" test, approval must be sought from the Executive Director or nominated officer.

### **Carrying Out Tests**

Alcohol and drug testing will be carried out only by qualified and competent representatives from an external toxicology company who will use accepted and reliable methods and ensure that tests are carried out with the least possible intrusion to employees' privacy. All possible measures will be put in place to ensure confidentiality of test results, and checks will take place to avoid any false results.

Employees who are tested have the right to be informed of their test result before the result is shared with management.

An employee who unreasonably refuses to submit to an alcohol and drug test in accordance with Council policy, may be subject to disciplinary action.

### **Action After a Non-Negative Test**

Action after a non-negative test will depend on the circumstances. Formal action should not be considered until the line manager has had an opportunity to speak further to the employee. Help and support, as outlined below, will be considered but it may be necessary for the Council to take disciplinary action under the Disciplinary Policy or Disciplinary Framework for Teachers, up to and including dismissal where:

- The effects of the employee's alcohol or drug taking are or could be serious, e.g. the employee works in a safety critical job and his/her use of alcohol or drugs has or could lead to a risk to health and safety.
- A previous alcohol or drug test of the employee within the last two years has produced a non-negative result.
- The employee denies that either alcohol or drugs are the cause of the problems;

- The employee refuses to accept the offer of referral for assessment and treatment;
- The employee stops a course of treatment before complete; or
- Does not meet the standards of work needed after undergoing treatment.

Where action is taken under the Disciplinary Policy or Disciplinary Framework for Teachers, an employee will have the right to appeal under the appropriate policy.

## **8 Help and Support**

The Council will endeavour to ensure that advice and help are made available to any employee who feels that they have a problem with alcohol or drug misuse. In the first instance, individuals will be encouraged to seek help from their General Practitioner. Under these circumstances, a referral will also be made to Occupational Health. It may be necessary to request that the employee refrains from work temporarily, undertakes restricted duties or is assigned to an alternative temporary role to ensure their health and safety and that of others.

## **9 Treatment**

If the employee accepts that they have an alcohol or drug problem, we will offer support and treatment as long as they produce medical certificates to cover the period or periods of absence they need to be absent from work to receive treatment.

We may consider suitable alternative employment, in line with the Redeployment Policy, if:

- the alcohol or drug problem is not resolved; or
- where the performance is not satisfactory when they return to their original or equivalent job.

## **10 Relapse**

We will consider each case individually if the employee's work performance or standard of behaviour suffers again as a result of alcohol and/or drug-related problems.

The default position will be to provide further support, but disciplinary action may be considered where:

- the standard of work or behaviour is still not satisfactory; or
- The work is satisfactory throughout the period of treatment but lapses very soon afterwards.

Up to date medical advice will be sought before any decision is made to dismiss.

## **11 Ongoing Support and Review**

Any employee who seeks the assistance of the Council in finding treatment for a drugs or alcohol problem has the complete assurance of confidentiality.

It is expected that the line manager of an employee in such circumstances will offer support to the employee and appropriately monitor the situation to ensure that the

employee is receiving the help required and is maintaining satisfactory work performance in the period following treatment.

If the employee wishes to discuss any concerns with a third party, they should contact the Employee Relations team for assistance.